United States Court of Appeals

for the

District of Columbia Circuit

TRANSCRIPT OF RECORD

BRIEF FOR APPELLANT

164

UNITED STATES COURT OF APPEALS
FOR THE DISTRICT OF COLUMBIA CIRCUIT

LENA ROBINSON,

Appellant,

v. No. 24,508

DIAMOND HOUSING CORP.,

Appellee.

APPEAL FROM THE DISTRICT OF
COLUMBIA COURT OF APPEALS

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TABLE OF CONTENTS

TABLE OF AUTHORITIES

Page

CASES (cont'd.):

* indicates authorities primarily relied upon

CASES (cont'd.) — Page

STATUTORY PROVISIONS:

*indicates authorities primarily relied upon

REFERENCES TO RULINGS

1. Oral rulings of trial court denying motions for continuance, motion to amend answer, and granting motion for summary judgment. (Record, pp.1-47).

2. Opinion of District of Columbia Court of Appeals. 267 A.2d 833 (1970).

STATEMENT OF ISSUE PRESENTED

Did the trial court err in granting appellee summary judgment for possession and precluding appellant from raising her defenses based on appellee's retaliatory motive and violations of the District of Columbia Housing Regulations?

This case has been before this Court in the following instances:

1. Motion for Stay Pending Appeal, denied, Order of Jan. 6, 1970 (Tamm, Leventhal, & Robb, JJ.).
2. Suggestion for Rehearing En Banc, denied, Order and Statement of April 14, 1970 (Wilkey, J., not participating).
3. Motion to Proceed In Forma Pauperis, granted, Order of July 31, 1970 (Wright, C.J.).
4. Petition for Allowance of Appeal, granted, Order of Sept. 25, 1970 (Fahy & McGowan, JJ.).

STATEMENT OF THE CASE

On May 2, 1968, Lena Robinson and her four children moved into the house owned by the Diamond Housing Corporation at 1716 Eighth Street, N.W. Eight days after she failed to pay the rent falling due on July 2, she was sued by Diamond Housing for possession of the premises.[1/] Mrs. Robinson successfully defended that suit by establishing to a jury that her lease was voided by the existence of substantial housing code violations at the commencement of her tenancy. On appeal, the District of Columbia Court of Appeals (DCCA) affirmed the judgment for Mrs. Robinson. Diamond Housing Corp. v. Robinson, 257 A.2d 492 (1969).[2/]

The evidence which the jury ultimately accepted as reflecting the conditions of Mrs. Robinson's home included proof of the existence of the following serious housing defects: large pieces of plaster were missing throughout the house; a back bedroom wall was unattached to the ceiling; nails protruded along the side of the

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1/ See Diamond Housing Corp. v. Robinson, LT 62391-68, Opinion and Order of Belson, J., Oct. 16, 1968, on file in the record of this appeal.

2/ A petition for review of this decision was denied. D.C. Cir. No. 23,891, Order of Sept. 25, 1970.

stairway; a pane of glass was missing from a living room window; a kitchen window frame was out of position leaving an opening in the wall to the outdoors; no front step to the porch existed; and the porch was so shakey that the ground could be seen through its boards.[3/] Diamond Housing failed to prove that any of these defects were subsequently repaired; indeed, it admitted that they still existed when the instant suit was brought in December 1969, one and one-half years after Diamond Housing first knew of them.[4/]

In an attempt to circumvent the adverse rulings of the DCCA and the trial court, Diamond Housing, on December 2, 1969, again filed suit against Mrs. Robinson. This suit sought possession of Mrs. Robinson's premises and was based on the alleged expiration of a thirty-day notice to quit to the tenant. (R-49). On December 16, Mrs. Robinson filed her answer and jury demand to this action. (R-51). She alleged, inter alia, that Diamond Housing's suit must fail because it was provoked by an

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3/ See Diamond Housing Corp. v. Robinson, supra, note 1, Opinion of Belson, J., at 2-3.

4/ See Affidavit of Barry Mankowitz, Record at 64 (hereinafter cited R-64).

illicit retaliatory intent and was brought by a landlord who had knowingly continued to lease unsafe and unsanitary housing. The case was then certified to the jury calendar.

On December 17, Diamond Housing filed a motion for summary judgment. (R-60). This motion was supported by affidavits attesting that a thirty-day notice had been served on Mrs. Robinson and that the corporation was "unwilling to make any repairs to the premises involved herein and it [did] not presently desire to continue to rent the premises. . . ." (R-64).

The hearing on that motion was unilaterally set by counsel for Diamond Housing for December 23. On the morning of this date an appearance was made by Christopher Brown, Esq., for Mrs. Robinson in order to request a continuance of the summary judgment hearing due to the temporary absence from the District of the defendant's attorney, Richard B. Wolf, Esq. Landlord and Tenant Judge Hyde denied this motion, setting the hearing for later that same day.

At the hearing the Landlord and Tenant Court again denied Mrs. Robinson's motion for a continuance on account of her counsel's absence. It also denied her motion

to schedule the hearing at least in accord with the timing and notice provisions of General Sessions Rule 56(c). It denied Mrs. Robinson's motion to amend her answer while granting Diamond Housing the same relief regarding its complaint. (R-65). Finally, the judge ruled that summary judgment was appropriate because no material relevant facts were in dispute. It reached this conclusion by ruling as a matter of law that Diamond Housing's motives in seeking to evict Mrs. Robinson were irrelevant to this suit. The defense of retaliatory eviction was explicitly recognized as not being available to this tenant, nor was a defense based on housing code violations. The judge ruled that all Diamond Housing need establish to evict Mrs. Robinson was the service and expiration of a thirty-day notice to quit. Because this fact was not disputed, Judge Hyde granted summary judgment for possession for Diamond Housing.

Pending appeal of this decision, Mrs. Robinson sought a stay of her eviction from the premises. This was denied by the trial court, the DCCA, and a division of this Court. While Mrs. Robinson's suggestion for a rehearing en banc of this latter decision was pending before the full Court, she was forced to abandon her run-down

premises in order to safeguard the health and welfare of her family. As a consequence of this change of circumstances, Mrs. Robinson's suggestion for a rehearing en banc was denied. See Robinson v. Diamond Housing Corp., D.C. Cir. No. 23,850, Statement of April 14, 1970 (Robinson, J.).

Mrs. Robinson's appeal to the DCCA on the merits in this second possessory action resulted in an affirmance of the trial court. 267 A.2d 833 (1970). The instant appeal to this Court followed.

SUMMARY OF ARGUMENT

Appellant argues at the outset that she was prejudiced by two procedural-issue errors of the trial court. The court was wrong in refusing to continue the hearing date on appellee's motion for summary judgment which was unilaterally set by counsel for appellee. Because the rules of the Landlord and Tenant Branch required that appellant be given more time in which to respond to the motion, and because she should have been granted a short stay until her attorney returned from an out-of-town trip, the trial court erred in making appellant's substitute counsel go forth on the hearing date.

The second procedural error was the trial court's refusal to permit appellant to amend her answer to assert the added defense of inadequate service of process. In so ruling, the trial court failed to comply with D.C. Code § 13-101, which requires it to adopt as much as is practicable the Federal Rules of Civil Procedure, which would permit amendment as of right in this instance. The trial court also erred in ruling that actual receipt of process waived appellant's right to receive it in the statutorily required manner.

On the merits, the trial court was incorrect in ruling that appellee was entitled to a judgment for possession as a matter of law merely upon proof of having served appellant with a thirty-day notice to quit her premises. Appellant should have been permitted to go to trial on her defenses based on retaliatory eviction and existing housing code defects. The trial court was wrong in ruling that appellant was not entitled to rely on the defenses set forth in Edwards v. Habib, 130 U.S. App. D.C. 126, 397 F.2d 687 (1968), and now in the District of Columbia Housing Regulations § 2910. It further erred in permitting appellee, who admittedly refused to make the needed repairs at appellant's premises, to use the court system before complying with the District of Columbia law. The District of Columbia Court of Appeals compounded this error by giving District of Columbia landlords a route with which to bypass the case law in this jurisdiction which was meant to bolster the Housing Regulations and by ruling in a manner so as to further deplete the housing stock in the District.

ARGUMENT

I. APPELLANT'S FAILURE TO FILE COUNTERING AFFIDAVITS OF FACT IN THE TRIAL COURT DOES NOT PRECLUDE HER FROM RAISING HER LEGAL ISSUES ON APPEAL

The District of Columbia Court of Appeals in part based its affirmance of the trial court on the notion that, because Mrs. Robinson had not filed affidavits countering Diamond Housing's factual assertions, no material issues of fact were in dispute and summary judgment was appropriate. 267 A.2d at 835. The DCCA failed to appreciate, however, that (1) the trial judge accepted Mrs. Robinson's counter assertions, but deemed them legally irrelevant, and (2) the introduction of formal affidavits was precluded by the trial court's refusal to continue the summary judgment hearing.

The ruling of the trial court was in no way based on appellant's failure to meet the requirements of Gen. Sess. R. 56(e). See transcript passim; Robinson v. Diamond Housing Corp., D.C. Cir. No. 23,850, April 14, 1970 (en banc statement), slip opinion at 4 n.7. Instead, the trial judge took the view that the facts set forth by Diamond Housing were irrelevant to its suit for possession of Mrs. Robinson's home. Accordingly, Mrs. Robinson's

failure to specifically reiterate her assertions regarding Diamond Housing's purported illicit motives was of no consequence.

Second, even if it were crucial to Mrs. Robinson's case that countering affidavits be produced, she was unfairly denied an opportunity to assemble these documents because of the timing of the premature hearing in which she was forced to plead her case. See Gen. Sess. R. 56(f). Mrs. Robinson was arbitrarily denied a brief continuance which could have enabled her to meet Rule 56(e).

The date for the summary judgment hearing was set unilaterally by counsel for plaintiff for December 23, 1969. However, General Sessions Rules 6(e) and 56(b) & (c) and Landlord and Tenant Rules 4(e) and 11, which govern the timing of the hearing, required that it be held no earlier than December 24, 1969.[5/] Mrs. Robinson's substituted

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5/ G.S. Rule 56(c), made applicable to this case by L&T Rule 11, requires that a motion for summary judgment "be served at least five days before the time fixed for hearing." When service is made by mail, as in this case, one additional day is added to the prescribed period. G.S. Rule 6(e); L&T Rule 11. Sundays (in this case December 21) are excluded from the computation. G.S. Rule 6(a). Thus, the motion having been mailed to defendant's counsel on December 17, it was not ripe for hearing until at least December 24. See Brief for Appellant, D.C.C.A. No. 5194, at 8-11, on file in record in this appeal.

counsel could surely have utilized that extra day. In a situation where the proper legal resolution is as complicated as it is in this case, twenty-four hours of preparation time serve much better than do two hours.

Appellant further contends that the trial court abused its discretion in not granting a two-week continuance of the summary judgment hearing until her counsel returned from a trip away from the District of Columbia. The denial of a continuance greatly hindered appellant's defense, denying her newly-found counsel of an opportunity for full preparation and the filing of opposing affidavits.[6/]

6/ See Brief for Appellant, D.C.C.A. No. 5194, at 5-8.

II. THE TRIAL COURT ERRED IN REFUSING TO PERMIT APPELLANT TO AMEND HER ANSWER TO ASSERT A JURISDICTIONAL DEFENSE

Appellant moved at the summary-judgment hearing to amend her answer to assert the additional defense of lack of adequate service of process (R-26). The trial judge denied this motion, stating as his grounds:

> You can't come in, after you've asserted all your real defenses here, and think up that at the last minute after we are engaged here in a motion for summary judgment. (R-26).

He further stated that Mrs. Robinson must have obtained actual notice of the suit and therefore no prejudice would result from his denial of her motion to amend.

The DCCA elaborated on this reasoning, ruling that a landlord-and-tenant-court defendant, unlike any other civil litigant in the District of Columbia, can only challenge service of process by filing a motion to quash prior to filing his answer. 267 A.2d at 834 n.2, citing L&T Rule 4(d).

Under the rules of the Court of General Sessions, a defendant may amend his answer as of right "at any time within 10 days after it is served." G.S. Rule 15(a). See

also Fed. R. Civ. P. 15(a). Amendments relating to the defense of insufficiency of process are not waived when made by motion pursuant to Rule 15(a) and must be granted as a matter of course. See G.S. Rule 12(h)(1); 1A Barron & Holtzoff, Federal Practice & Procedure § 370 (1969 Supp.). Thus, a defendant has until ten days after the filing of his answer in which to object to the jurisdiction of the court.

As the record indicates, Mrs. Robinson's answer was filed on December 16, 1969. Her motion to amend was made on December 23, within ten days thereafter. She concludes that accordingly the trial court erred in denying her motion to amend because she should have been permitted to amend as of right.

Appellant contends that G.S. Rules 15(a) and 12(h)(1) govern this case even though they have not been made specifically applicable to Landlord and Tenant Branch cases by Landlord and Tenant Rule 11. Indeed, nowhere in the specific Landlord and Tenant Rules is there a provision permitting any party to amend its pleadings in any respect. Appellant argues that the absurd rigidity which would result from not allowing any party to amend

its pleadings compels a ruling that General Sessions Rule 15 be read into the Landlord and Tenant Rules. In fact, the trial judge must have reached such a conclusion because he did permit Diamond Housing to amend its complaint. (R-40).

Several lines of reasoning can lead this Court to this conclusion. First, Landlord and Tenant Rule 11 cannot reasonably be read as an exclusive listing of those General Sessions Rules which are operative in the Landlord and Tenant Branch. Nothing in Rule 11's language would require such a narrow reading. The adoption of this narrow construction would lead to harmfully restrictive results. The better view, it clearly seems, should be to apply to the Landlord and Tenant Branch all of those General Sessions procedures which, even though not listed in Rule 11, are nevertheless an intricate part of any fair and just court proceeding, albeit a summary proceeding. There can be no logical reason under which amendment of pleadings cannot and should not be permitted in the Landlord and Tenant Branch.

This result seems compelled by this Court's recent rulings in McKelton v. Brune, ____U.S. App. D.C.

___ , 428 F.2d 718 (1970) and Lee v. Habib, ___ U.S. App. D.C.____, 424 F.2d 718 (1970). Both pointed to D.C. Code § 13-101 (1967), which requires all General Sessions court rules to "conform as nearly as may be practicable to the forms, practice, and procedure proscribed by the Federal Rules of Civil Procedure. . . ." If local court in forma pauperis procedures, as in McKelton, and procedures for an indigent's receipt of a free trial transcript, as in Lee, are to be as similar as possible in each court system, there seems to be no ground for departing from this rule regarding a defendant's right to amend his answer.[7/]

The second basis for the trial court's denial of Mrs. Robinson's motion to amend -- that timely actual knowledge of having been sued waives a defendant's right to challenge service -- is similarly without valid support, although it seems recently to have been bolstered by the DCCA's opinion in Gordan v. William J. Davis, Inc., ____ A.2d ____ (October 21, 1970). The statute regulating

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7/ Constitutional requirements can also compel this same result. See Lee v. Habib, 424 F.2d at 904.

service of process in a landlord's suit for possession, D.C. Code § 16-1502 (1967), requires that a "diligent and conscientious" effort be made to effect personal service before the process server can resort to a substituted method of service, such as posting. Dewey v. Clark, 86 U.S. App. D.C. 137, 180 F.2d 766 (1950). Statistical information available from court records indicates that this statutory requirement is regularly being abused. See Bell v. Tsintolas Realty Co., ____ U.S. App. D.C. ____, _____ n.7, 430 F.2d 474, _____ n.7 (1970). If the trial court's view of the law were accurate, there would be no effective manner of enforcing this statute. Service of process could be made in any haphazard manner because the only group who could challenge service -- those who know how they were served -- would not be able to do so. Thus, the prophylactic nature of § 16-1502 would be destroyed.

If actual notice were a waiver of a defendant's right to receive process in the statutorily prescribed manner, there seems to be no reason why this Court in Dewey v. Clark, supra, would have gone into detail regarding the manner of service in that instance. If actual notice

constituted a waiver of the jurisdictional defense, such a discussion would have been unnecessary because that defendant had actual notice. Compare Morfessis v. Marvin's Credit, Inc., 77 A.2d 178 (D.C. Mun. App. 1950). Indeed, the DCCA seems on an earlier occasion to have recognized the error of the trial court's ruling. See Lynch v. Bernstein, 48 A.2d 467 (D.C. Mun. App. 1946) (actual receipt of notice to quit is no waiver of right to receive it as statutorily required).

For the reasons stated above, appellant contends that the trial court and the DCCA were incorrect in refusing to permit her to amend her answer in order to assert a jurisdictional defense.

III. APPELLANT WAS ENTITLED TO RAISE THE DEFENSE OF RETALIATORY EVICTION

The trial court and the DCCA both ruled that Mrs. Robinson was legally unable to rely upon the defense of retaliatory eviction as set forth by this Court in Edwards v. Habib, 130 U.S. App. D.C. 126, 397 F.2d 687 (1968), cert. denied, 393 U.S. 1016 (1969). Edwards held that a landlord cannot oust his tenant with a suit for possession of his premises in order to punish the tenant for reporting housing regulation violations to governmental authorities. The Edwards doctrine has been reasserted in the recent amendments to the Housing Regulations for the District of Columbia, which were brought to the DCCA's attention at oral argument. The regulations now provide:

> No action or proceeding to recover possession of a habitation may be brought against a tenant, nor shall an owner otherwise cause a tenant to quit habitation involuntarily, nor demand an increase in rent from the tenant, nor decrease services to which the tenant has been entitled, nor increase the obligations of a tenant, in retaliation against a tenant's:
>
> (a) good faith complaint or report concerning housing deficiencies made to the owner or a governmental authority, directly by the tenant or through a tenant organization.
>
> . . .

> (c) good faith assertion of rights under these Regulations, including rights under Sections 2901 or 2902.8/

Subsection (c) further broadens Edwards to prohibit retaliation for asserting in court or elsewhere the right to report housing violations.

The DCCA has attempted to carve out a large exception to this retaliatory eviction doctrine:

> [W]e are of the opinion that the retaliatory defense of Edwards v. Habib . . . is not available to a tenant in a case such as this where she was successful in a prior Landlord and Tenant action and is being evicted after the expiration of a thirty-day notice because the landlord wishes to withdraw the property from the rental market. The Edwards case involved a situation where the landlord attempted to evict the tenant because of her complaints to the housing authorities and it should be, we think, limited to its facts.

But even if Edwards were limited in the narrow manner of the DCCA's emasculated reading, Mrs. Robinson indeed fell within that rule. She sought to assert in defense that Diamond Housing's suit involved a "situation where the landlord attempted to evict the tenant because of her complaints to the housing authorities." (R-30).

8/ Housing Regulations of the District of Columbia § 2910, D.C. Register, Aug. 1970.

Furthermore, the Edwards court made no exceptions in its ruling for those landlords, such as Diamond Housing, who have been precluded from recovering possession due to violations of District of Columbia law. If anything, the Edwards rule should be more readily applicable to such a landlord because its past actions have made its motives highly suspect. Diamond Housing is the party who has blatantly helped perpetuate what the Edwards court referred to as the "appalling housing conditions"[9/] in Washington.

A logical basis might possibly exist for the lower courts' position if they had predicated their ruling on some type of evidentiary principle which regarded the possibility of a retaliatory motive in a case such as this to be exceedingly remote. In such a case the exclusion of a retaliatory-motive defense might perceivably be arguable. But in the instant case, the exact opposite tendency exists. As counsel for appellee admitted below: "Any jury is going to have to practically say that there is retaliation." (R-39). Similarly, the trial judge came to the conclusion that "there wouldn't be but

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9/ 130 U.S. App. D.C. at 140, 397 F.2d at 701 (footnotes omitted).

one way this issue could be decided by the jury . . . ." (R-41). Thus, both parties and the trial court have been unanimous in concluding that Diamond Housing would be found to harbor a retaliatory intent if the issue were permitted to go to the jury.

The logic in precluding a tenant who has successfully defended a suit for possession from utilizing in a second suit a retaliatory eviction defense remains elusive. The public policy behind Edwards is no less compelling in this case: "To permit retaliatory evictions [still] . . . would clearly frustrate the effectiveness of the housing code as a means of upgrading the quality of housing in Washington."[10/] Indeed, the need to protect an already victimized tenant takes on increased importance.

The trial judge's and the DCCA's defiant attitude toward Edwards may have partially been predicated upon a concern that the landlord will be unable to disprove the retaliatory nature of his motive. But this inherent difficulty has directly been acknowledged and dealt with in Edwards. This Court recognized that questions of

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10/ Id. at 139-40, 397 F.2d at 700-01.

permissible or impermissible purpose will present the need for determinations that are "not easy." It noted, however, that the problem is not unique and courts must deal with it "in a host of other contexts."[11/] The Court nevertheless sided with General Sessions Chief Judge Greene in concluding:

> There is no reason why similar factual judgments cannot be made by courts and juries in the context of economic retaliation [against tenants by landlords] for providing information to the government.[12/]

The Edwards court seems to have foreseen clearly a situation such as the present one. It made clear that a tenant who was successful on a first suit need not be "entitled to remain in possession in perpetuity."[13/] The landlord can gain possession after his "illegal purpose is dissipated."[14/] In the present case, Diamond Housing should

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11/ Id. at 142, 397 F.2d at 703.

12/ Id.

13/ Id. at 141, 397 F.2d at 702.

14/ Id.

have no difficulty in establishing the sincerity of its motives if only it would conform to the law by correcting the wretched conditions existing in Mrs. Robinson's home. If Diamond Housing would begin to comply with the housing laws of the District of Columbia, its stature in the eyes of a jury would be greatly enhanced. It should only be after full repair has been accomplished that the courts of this jurisdiction can come to Diamond Housing's aid.

The instant suit for possession not only violates rights afforded by the Housing Regulations; it also threatens the very integrity of the judicial system. To permit a landlord to use the judicial process to evict a tenant because of that tenant's use of lawful defenses in a prior judicial action would make a mockery of the judicial system. The tenant's trial in the first case would be a futile gesture, serving as a means to undermine public policy, the judicial process, and those who seek relief in it. A defense of housing code violations would have no legal significance if a tenant who prevails in a suit for possession promptly be evicted in a second possessory action because of her reliance on those defenses. No tenant would be foolhardy enough to assert

housing code violations as a defense in a suit for possession when the certain and ironic result would be to prepare the landlord's easy way to an unchallenged eviction in a second summary action.

In addition to the right to challenge the notice to quit on the grounds that it is retaliatory, appellant must also have the right to challenge as retaliatory appellee's desire to remove the property from the rental market. If the Housing Regulations are to have meaning, the court cannot permit a corporation or individual landlord to close down a rental unit in order to retaliate against the tenant for his having exercised rights under the Housing Regulations.

This is not the first time a court has been asked to prevent the closing of a business or to otherwise restrict business operations in order to safeguard basic statutory rights. A similar situation has been presented in the field of labor law. In Textile Workers Union v. Darlington Mfg. Co., 380 U.S. 263 (1965), the Supreme Court refused to allow a corporation to close down one of its units in retaliation for protected activity. The

court held that the action of the corporation was impermissible because it would have a chilling effect upon the exercise of certain legislatively guaranteed rights. The specific facts and the statute involved in Darlington are of course different from the instant case, but the rationale of that decision is no less significant.

A legislative and regulatory scheme existed in both Darlington and the instant case to protect a special class of persons. The safeguards in Darlington were directed at members of labor organizations; here the protected class consists of tenants living in substandard housing. In both situations the protective scheme was silent on the specific question of whether a regulated party may close down one of its units in order to undercut the purposes which the safeguards were designed to afford. When faced with this question in Darlington, the Supreme Court realized that prevention of such action by the corporation was necessary if the labor act was to be meaningful; it accordingly read protection from such action into the statute.

This Court should make a similar ruling in the instant case and hold that this landlord may not close

down his rental unit if his purpose is retaliatory against a tenant for the tenant's reliance on housing violations as a defense to a suit for possession.[15] The issue is vital to the maintenance of an adequate supply of safe and sanitary housing in the District of Columbia and for the protection of rights guaranteed to tenants by the Housing Code.

The Court should furthermore establish guidelines similar to those adopted by the Supreme Court in analogous labor cases designed to assist the trier of fact in resolving the factual problems which will be presented.[16] The Court should rule that, where a notice to quit is issued by a landlord after the tenant has successfully defended a prior suit for possession on the ground of housing code violations, the notice to quit be deemed "inherently destructive" of basic tenant rights, that no specific proof of retaliatory motive is needed, and that

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15/ Public records on file with the District of Columbia Recorder of Deeds reflect that the appellee corporation is listed as the owner of approximately 290 lots in the District of Columbia.

16/ See NLRB v. Great Dane Trailers, Inc., 388 U.S. 26 (1967); NLRB v. Erie Resistor Corp., 373 U.S. 221 (1963); Lane v. NLRB, 135 U.S. App. D.C. 372, 418 F.2d 1208 (1969).

the trier of fact can find that the suit for possession is impermissibly motivated and hence barred, even if the landlord introduces evidence that the notice to quit was motivated by business considerations.[17] The notice to quit in the second action should be deemed to carry with it its "own indices of [retaliatory] intent",[18] making specific proof of retaliatory motive unnecessary to defeat a claim by the landlord of a legitimate business purpose.[19] Further, the burden of proof should be on the landlord to establish that he was motivated by over-riding legitimate business considerations, since proof of motivation is most accessible to him.[20]

As the Supreme Court has noted in labor cases, situations such as the instant one may present a complex of motives calling for the trier of fact to weigh the interests of both sides and to reach a decision "preferring one motive to another" in light of the provisions of the legislation involved and its policy.[21] In Edwards v.

17/ Cf. NLRB v. Great Dane Trailers, Inc., supra.

18/ See NLRB v. Erie Resistor Corp., supra.

19/ Cf. Id.

20/ Cf. NLRB v. Great Dane Trailers, Inc., supra

21/ Cf. NLRB v. Erie Resistor Co., supra.

Habib, this Court ruled "that Congress, by directing the enactment of the housing code, impliedly directed the court to prefer the interests of the tenant who seeks to avail himself of the code's protection." The preceding rules regarding sufficiency of evidence and burden of proof will enable the courts to follow this directive of Congress requiring protection of tenant rights over the interests of a landlord who has flouted the housing laws.

Because the trial court erred in refusing, as a matter of law, to permit Mrs. Robinson to raise the defense of retaliation, the court's decision in granting Diamond Housing summary judgment should be reversed.

IV. APPELLEE SHOULD NOT BE ABLE TO UTILIZE THE COURT SYSTEM TO EVICT APPELLANT UNTIL IT BRINGS ITS PREMISES INTO COMPLIANCE WITH THE HOUSING REGULATIONS.

The "clean hands" doctrine and the integrity of the judicial system require that appellee, who had been found to be in violation of the Housing Regulations, be precluded from using the courts to maintain a suit for possession until it complies with the requirements of the housing code. The directive of the DCCA in both of Mrs. Robinson's appeals, 257 A.2d at 495; 267 A.2d at 835, allowing the landlord to enforce a thirty-day notice to quit through a suit for possession without simultaneously requiring the landlord to correct the housing violations, has authorized the use of the courts by a party who is in clear violation of the law. Appellant urges that this unfortunate guideline be reversed.

It is not novel doctrine to assert that a party in Diamond Housing's position can only invoke a court's relief after it has complied with the law of this jurisdiction and brought its property up to housing code standards.[22/] This rule finds its roots

22/ This precondition has met with approval in Judge Belson's trial court opinion in Mrs. Robinson's first case (pp. 10-11) and in Note, Leases and the Illegal Contract Theory--Judicial Reinforcement of the Housing Code, 56 Geo. L.J. 920, 936 (1968).

in analogous legal precedent.

It has long been established in this jurisdiction that a court's powers cannot be invoked to assist a party who has previously committed an illegal act such as engaging in an illegal contract. Hunter v. Wheate, 53 App. D.C. 206, 289 F. 604 (1923)[23]. Diamond Housing has been found to have engaged in illicit conduct which resulted in the voiding of its contract with Mrs. Robinson. Mrs. Robinson sought to establish that Diamond Housing was still engaging in this illicit conduct at the time it filed the instant suit against her. Because it had failed to cease this illegal activity--which was within its power to do--the trial court was obliged not to let itself be used to aid Diamond Housing in its bid to eject her. The trial court should have refused relief at least until the housing code violations were remedied. Mrs. Robinson intended to show at trial that Diamond Housing was still a wrongdoer and therefore the court must refuse to be used as an affirmative instrumentality of injustice; it had no choice but to leave the wrongdoer to its own devices.[24]

23/ Hunter ruled that a woman who had consented to a contract to have performed on her an illegal abortion could not later sue the performing doctor for negligence in performing it. See also Wheeler v. Sage, 67 U.S. (1 Wall.) 518 (1864).

24/ See, e.g., Borden Co. v. Clearfield Cheese Co., Inc., 244 F. Supp 366 (1965), citing Shelley v. Kraemer, 334 U.S. 1 (1948).

Although appellant recognizes that courts will not refuse relief to a party when the wrong done is a thing of the past (cont'd.)

An analogous situation to the present one faced this Court in Olverson v. Olverson, 54 App. D.C. 48, 293 F. 1015 (1923). Mrs. Olverson's former husband had obtained a divorce from her based on adultery. The decree denied her the right to remarry while still a District of Columbia resident. To avoid this ruling she married Mr. Olverson in Baltimore. Mrs. Olverson later sought to obtain a divorce from Mr. Olverson in the District of Columbia courts. This Court refused relief:

> We do not think that the courts of the District can be used for that purpose. The appellant deliberately set at naught a District statute, which she was bound to respect and obey, and she cannot now ask the courts of this jurisdiction to relieve her of the obligations of a relation which she willfully and wrongfully assumed, or to enforce the right to support which would have been hers had the relation been lawfully contracted in the District. 25/

24/ (cont'd.) and collateral to the present action, Brooks v. Martin, 68 U.S. (2 Wall.) 70, 79-80 (1864), appellant asserted below that Diamond Housing's past illegal act--maintaining housing in an unlawful condition--had continued to the present. It therefore cannot be said that the taint from a prior act has in any way dissipated. See Olverson v. Olverson, supra. As the United States Court of Appeals has declared:

> Although most cases in which the clean hands doctrine has been applied are cases in which the cause of action has arisen out of or been the fruit of unconscionable conduct, we do not understand that it is a prerequisite to the application of the doctrine that the cause of action shall have so arisen. It is sufficient to bar relief that plaintiff has been guilty of unconscionable conduct directly related to the cause of action . . . ."

Brantley v. Skeens, 105 U.S. App. D.C. 246, 266 F.2d 447 (1959), citing Mas v. Coca-Cola Co., 163 F.2d 505, 508 (4th Cir. 1947).

25/ 54 App. D.C. at 49, 293 F. at 1016.

Diamond Housing has similarly been found to have entered into an unlawful contract--in its case by renting out substandard housing. It has flouted the District's laws and has challenged the integrity of the court. It has plainly stated it is unwilling to make required repairs. It should not be permitted now to ask the courts to relieve it of its obligations.

Diamond Housing is more fortunate than Mrs. Olverson, however, because it can unilaterally improve its status. By repair it can comply with the housing regulations. After taking this step it can then seek judicial relief.

Another situation of great similarity arose in Edwards v. Habib, supra. The question raised there was how a landlord, once found to harbor a retaliatory intent and therefore precluded from recovery of possession, could ever again gain possession. Edwards solved this problem by stating that once he can prove that this illegal purpose is dissipated, the landlord can act to evict his tenant. 130 U.S. App. D.C. at 141, 397 F.2d at 402.

Diamond Housing should be held to no less a standard. Only when its illegal activity has been dissipated by its actions in repairing the premises, can it then go into court and seek to evict.

This same result is reinforced by that line of cases in

this jurisdiction which requires a court of equity[26] to refuse relief to a party who comes into court with "unclean hands."[27] Having been shown to have deliberately flouted the District's housing laws, Diamond Housing should not be given relief until it rectifies its position and repairs the premises.[28]

To allow Diamond Housing to evict Mrs. Robonson without first complying with the housing regulations would undermine public policy.[29] The need in the District is for more, not less, suitable low-income housing. To permit Diamond Housing to avoid its responsibilities to Mrs. Robinson by taking her premises off the rental market would only tend to exacerbate the present housing shortage crisis.[30] It is against public policy for a

26/ The trial court exercises equity powers. See, e.g., Morrow v. District of Columbia, 135 U.S. App. D.C. 160, 417 F.2d 728 (1969). Cf. Edwards v. Habib, 130 U.S. App. D.C. at 140, 397 F.2d at 701.

27/ See, e.g., Cochran v. Burdick, 67 App. D.C. 87, 89 F.2d 831 (1937); Combs v. Snyder, 101 F. Supp. 531 (1951) (three-judge court), aff'd 342 U.S. 939 (1952).

28/ The three-judge court in Combs v. Snyder declared:

> Few things are clearer than that one who comes seeking protection for conduct that he concedes to be criminal has unclean hands within the meaning of this principle.

101 F. Supp. at 532.

29/ Where a suit in equity concerns the public interest as well as the private interests of the litigants . . . [the 'clean hands'] doctrine assumes even larger and more significant proportions. For if an equity court properly uses the maxim to withhold its assistance in such a case it not only prevents a wrongdoer from enjoying the fruits of his transgression but averts an injury to the public. Precision Instrument Mfg. Co. v. Automotive Maintenance Machinery Co., 324 U.S. 806, 815 (1945).

30/ Edwards v. Habib, supra, has judicially noted the "appalling condition and shortage of housing in Washington . . . ." 130 U.S. App. D.C. at 140, 397 F.2d at 701.

house to stand empty in a city where adequate dwellings fall far short of the demand for them. An occupied house is financially unproductive to the landlord and of no help in housing a family in dire need of a home. Courts "may appropriately withhold their aid where the plaintiff is using the right asserted contrary to the public interest." Barber-Colman Co. v. National Tool Co., 136 F.2d 339, 344 (6th Cir. 1943). This Court's final resolution to the instant problem should not be one which will encourage a property owner to reduce this city's quantity of available decent housing.

It need not be feared that the resolution proposed by appellant will put the landlord in a straightjacket. Repairing the property is surely in its own best interests, for it is only in this way that it can realize a profit from it. Furthermore, there are other factors which might serve as bona fide reasons for it to terminate the current tenancy. It might prove that the tenant is committing waste on the remainder interest; an individual landlord might seek in good faith to inhabit the premises himself; or he may have been served with a condemnation order.[31/]

31/ Several of a landlord's bona fide reasons for recovering possession are listed at § 2-407 of the American Bar Foundation's Tentative Draft of its Model Residential Landlord-Tenant Code.

It is of profound importance that the integrity of this Court's decisions and the housing code not be undermined. Such would occur if this Court permitted a landlord who was leasing substandard housing to avoid the strictures of Javins v. First National Realty Co., ___U.S. App. D.C. ___, 428 F.2d 1071 (1970), and Brown v. Southall Realty Co., 237 A.2d 834 (1968), cert. denied, 393 U.S. 1018 (1969), by seeking to expeditiously kick out a tenant who has raised or is planning to raise this defense.

The following situation is becoming increasingly common in the Court of General Sessions: A landlord sues a tenant for possession based on nonpayment of rent. If the tenant is fortunate enough to have a lawyer (only about 2% do) and responds by raising a defense based on housing code violations, the landlord immediately seeks to squelch this defense by suing again on the basis of a thirty-day notice to quit.[32/] This move is designed to evict the "troublesome" tenant from the premises without having to upgrade the conditions of the premises so that they meet the housing code. It is an attempt to entirely skirt the public policy as set forth in the housing regulations and prior opinions of this Court.

The landlord should not be permitted to gain relief by one judicial device when he would be unable to do so by proceeding through the normal channels.

32/ See, Cooks v. Fowler, D.C. Cir. No. 24,546, Nov. 13, 1970, slip opinion at 6.

V. THE HOUSING REGULATIONS AND THE PUBLIC POLICY OF THE DISTRICT OF COLUMBIA SHOULD PRECLUDE A LANDLORD SUCH AS APPELLEE FROM REMOVING HIS PROPERTY FROM THE RENTAL MARKET BECAUSE HE IS UNWILLING TO COMPLY WITH THE HOUSING REGULATIONS

The directive which the DCCA gave to appellee and to all landlords in the District -- to avoid compliance with the Housing Regulations and to remove their property from the rental market if they are unwilling[33/] to make it habitable -- will have a serious adverse affect upon both the quantity and quality of housing -- especially low-income housing -- in the District of Columbia. The removal of property from the rental market, irrespective of any retaliatory aspects, will thwart the aim of the Housing Regulations to provide a supply of safe and sanitary housing and will thwart the public policy of Congress and of the District of Columbia. This Court should therefore hold that regardless of the issue of retaliation, a landlord

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33/ The DCCA's general guideline included landlords who are unable to repair their property as well as those who are unwilling to do so. In light, however, of appellee's affidavit supporting its motion for summary judgment in which it stated that it is unwilling to repair the premises, the court is not directly confronted in the instant case with the problems surrounding financial inability to repair.

such as appellee who is unwilling to repair his property and who wishes to remove it from the rental market in order to avoid compliance with the Housing Regulations may not be permitted to do so, and that a tenant may defend against a suit for possession on that basis.

The Housing Regulations evidence the desire of the District's Commissioner and City Council to force landlords to maintain their property in a habitable condition and to prevent the deterioration and decline of the existing housing supply.[34/] The Regulations, especially in light of the explicit direction by Congress for their enactment, also "indicate a strong and pervasive congressional concern to secure for the City's slum dwellers decent, or at least safe and sanitary places to live."[35/]

Indeed, Congress, in various housing acts, has clearly established a policy of eradicating substandard housing conditions and of increasing the supply of safe and sanitary dwellings. It has declared that the national housing policy requires "the elimination of substandard

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34/ See D.C. Housing Regulations § 2101.

35/ Edwards v. Habib, supra, 397 F.2d at 700.

and other inadequate housing . . . and the realization . . . of a decent home and a suitable living environment for every American family."[36/] To underline its concern, Congress has directed that all agencies of the Federal Government "having powers, functions, or duties with respect to housing . . . exercise their powers, functions, and duties under this or any other law, consistently with the national housing policy declared by this [the above] Act. . . ."[37/]

The Washington community "is confronted by a serious shortage of housing rentals its resident population

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36/ Section 1 of the United States Housing Act of 1937, 50 Stat. 888, as amended by the Housing Act of 1949, 63 Stat. 413, 42 U.S.C. § 1401 (1964).

37/ Id. The significance which Congress attached to the full implementation of housing codes is further evidenced by such measures as its requirement that a local community have "workable" programs for community improvement, which specifically encompass the existence and enforcement of housing code designed to provide safe and sanitary buildings, as a condition for obtaining urban renewal funds. Housing Act of 1949, supra, 42 U.S.C. § 1450. The standards of what constitute a workable local housing program were specifically expanded in 1954 to place an even greater emphasis upon prevention of deterioration and rehabilitation of substandard dwellings. Housing Act of 1954, 42 U.S.C. 1451(c).

can afford in order to live in uncrowded, decent, safe and sanitary dwellings." 38/ In addition,

> it is likely that Washington now is wasting -- that is, the city is physically depreciating -- much of its good housing stock by over-use and insufficient maintenance. 39/

In the District, 41% of the population -- 299,000 people -- lives in inadequate housing, and "more than 100,000 children are growing up in Washington now under one or more housing conditions which create psychological, social, and medical impairments, and make satisfactory home life difficult or a practical impossibility." 40/

38/ National Capital Planning Comm'n., Problems of Housing People in Washington, D.C., 53 (1966) (hereafter cited NCPC Report).

39/ Id. at 51.

40/ Id. at 6. The figure of 41% of the population living in inadequate housing was arrived at by the following calculations:

> 36,400 renter and homeowner households -- 15% of the total Washington population live in structurally substandard units or in structurally sound units that lack essential facilities;
> 21,800 renter and homeowner households -- 11% of Washington's total population live in overcrowded units which are structurally sound and have all essential facilities; and
> 45,100 renter households -- 16% of the total population live in uncrowded structurally sound housing units will all essential facilities. These households, however, pay more rent than they can afford. Id. at 5.

(Footnote cont'd)

The National Capital Planning Commission has reported that 17.9% of households which are rented in the District -- 31,700 households -- and 18.7% of persons living in rented households -- 85,500 persons -- live in housing units which are substandard.[41/]

The Department of Regional Planning of the Metropolitan Council of Governments found that in 1960 (the last year for which census statistics were available), 27,000 or 10.3% of the housing units in the District were

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(Footnote 40 cont'd)

Presumably the situations involved in the second and third categories have arisen because there is an insufficient number of low-rent units in the District which are structurally sound and which are within the financial reach of the resident population.

41/ NCPC Report at 45. This figure does not include persons living in overcrowded housing or housing which is financially beyond their means.

substandard and 31,100 or 11.9% of the households were overcrowded.[42/] On the assumption that the rate of overcrowding and below-standard housing which existed in 1960 would continue in the future, the Council of Governments made a projection of the housing conditions in the District in the years 1968, 1985, and 2000. The results, set forth below, indicate that the number of overcrowded and substandard housing will increase significantly unless action is taken to prevent these conditions:[43/]

I. Overcrowded Households (In Thousands)

1960	1968	1985	2000
31.1	46.9	56.3	60.2

42/ Metropolitan Washington Council of Governments, Housing Gap Quantification: A Methodology 34-35 (1968). The figures are based upon the 1960 Census of Population and Housing. Substandard housing, as used in the census reports, means those units which are deteriorating (i.e., units which need more repair than would be provided in the course of regular maintenance) and those which are dilapidated (i.e., units which do not provide safe and adequate housing). Overcrowded households are those with more than 1.01 persons per room. Id. at 32, 34.

The census figures on overcrowding and below-standard housing include home-owned dwellings as well as rental units. However, most of the units in the District which are inadequate are rental households. Only a small proportion of the figures represent home-owned dwellings. NCPC Report at 5.

43/ Id. at 34-35.

II. Substandard Housing Units (In Thousands)

1960	1968	1985	2000
27.0	37.3	38.6	41.3

The District of Columbia Court of Appeals ruling allowing landlords who are unwilling to put their substandard property into compliance with the Housing Regulations to close down rather than repair their units will exacerbate rather than ameliorate the housing problem for poor people. If the court's ruling, which is directed at all landlords in the District of Columbia, were implemented and all those who own below-standard housing chose to remove rather than repair their units, approximately 37,000 dwellings would be removed from the housing market.[44/]

The National Capital Planning Commission has found that the poor are already being shifted geographically within the city mainly by private market displacements.[45/] If the District of Columbia Court of Appeals decision in this case is allowed to stand not only will the rate of

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44/ Based on the Metropolitan Council of Government's estimate of substandard housing in 1968.

45/ NCPC Report at 51.

displacement of the poor by private landlords accelerate, but the ability of the poor to shift to other low-income housing will be severely limited by the accelerated rate of removal. "[B]oth physical and occupancy conditions of housing occupied by the poor are worsening,"[46/] and the DCCA's decision will only serve to aggravate an already deplorable situation.

As Mr. Justice Holmes noted, "Housing is a necessary of life. All the elements of a public interest justifying some degree of public control are present."[47/] The Congress, by authorizing, and the City Council, by enacting, the Housing Regulations for the District have recognized that decent, safe and sanitary housing is a basic necessity of a city. Both Congress and the Commissioners have also recognized that a degree of public control is necessary to ensure an adequate supply of such housing for the residents of the District of Columbia.

46/ NCPC Report, at 51.

47/ Block v. Hirsh, 256 U.S. 135, 156 (1921).

The gravity of the housing problem in the District of Columbia and the effect which the decision appealed from will have upon the housing situation requires that this Court reverse the DCCA's directive allowing unwilling landlords to remove rather than repair their substandard housing. The Court should rule that mere unwillingness to repair, as in the instant case, is not sufficient justification for the removal of property from the rental market, and that where a landlord asserts legitimate business considerations for the removal of the property, the burden of proving that the removal is justifiable be placed upon the landlord, for it is he who is most familiar with his own motivations and business considerations.

Appellant stresses that she is not urging the court to interfere with a man's dominion over his own home. At issue is rental property -- property which is operated by the landlord for business purposes.[48/] Nor is she asking

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48/ Appellee in the instant case is a corporation, licensed by the District of Columbia to operate a real estate business. The dwelling involved in the case is merely one of many hundreds of units owned and rented by appellee. See note 15 supra.

the Court to interfere in the absence of legislative action. All that is requested is the implementation of the Housing Regulations of the District of Columbia.

Furthermore, it is not suggested that a landlord may never close down one of his units or never go out of business. Appellant's position is only that he may not do so when his primary motivation is unwillingness to comply with the housing regulations.

CONCLUSION

For the reasons set forth above, the decision of the trial court should be reversed and the case remanded for an appropriate disposition.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I hereby certify that a copy of the foregoing Brief for Appellant was mailed, postage prepaid, to Herman Miller, Esquire, Attorney for Appellee, 400 Fifth Street, N.W., Washington, D.C. 20001, on this 18th day of November, 1970.

C. Christopher Brown

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Attorney for Appellant

IN THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT

No. 24, 508

LENA RONBINSON,

Appellant

v.

DIAMOND HOUSING CORPORATION

Appellee

ON PETITION FOR ALLOWANCE OF AN APPEAL FROM THE DISTRICT OF COLUMBIA COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA

APPELLEE'S BRIEF

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SUBJECT INDEX

TABLE OF CASES

STATEMENT OF QUESTIONS INVOLVED

1. The question involved is whether or not a retaliation issue is raised when a landlord seeks to terminate a tenancy on the service of a thirty days notice, where the tenant raises the defense of housing violations in a previous case, BUT HAS NOT COMPLAINED TO THE HOUSING INSPECTION OFFICE, OR ANY OTHER GOVERNMENTAL AGENCY.

The District of Columbia Court of Appeals answers this question "No." The respondent contends that this was a correct answer.

2. Another question involved is whether or not where a tenant has raised defenses of housing violations to a complaint filed for possession based upon non-payment of rent and prevailed in that case, is the landlord entitled, by the service of a thirty days notice, to terminate the tenancy where he is unwilling or unable to make the repairs and desires to withdraw the premises from the rental market?

The District of Columbia Court of Appeals answered this question "Yes." The respondent contends that this answer was correct and should have been answered "Yes."

3. Another question presented is whether or not the tenant by her negligence and failure to furnish heat for the premises, which failure caused all of the plumbing system to freeze, which resulted in an healthful and unsanitary condition and by reason thereof the Redevelopement Land Agency found new housing accomodations for the tenant and relocated her, whether this is landlord's defense to the tenant's contention that the landlord is not entitled to possession after the service of a valid thirty days notice to quit. This question arose after the decision by the

District of Columbia Court of Appeals.

The respondent contends that this question should be answered "Yes."

4. Another question presented is whether or not a principle decided by this court in Gaddis v. Dixie Realty Company, 136 U. S. App. D. C. 403, 420 F.2d 245 (1969) applies where the tenant vacated the premises by reason of permitting the plumbing to freeze and had to be relocated by R.L.A. and the premises became vacant and the landlord is willing and has indicated that it did not seek any money judgment for the rent. This question arose after the decision by the District of Columbia Court of Appeals and the respondent contends that the answer should be in the affirmative.

COUNTERSTATEMENT OF THE CASE

This case arose initially when the respondent filed its complaint for possession against the petitioner for non-payment of rent after the first months occupancy and alleged that the petitioner, by written monthly contract, waived the statutory right to a thirty days notice.

The pertinent defense made in the first case was to the effect that the lease was void and unenforceable and the jury made a special finding that there were substantial housing code violations existing at the time the lease was signed. It was uncontradicted, at the trial, that the respondent had not received any official notice of existing housing code violations from the city's housing inspectors and it was equally clear that the petitioner in this case had not made any complaints to the city's housing inspectors nor any other kind of complaints to any other governmental authority. In this case the first case decided by

the District of Columbia Court of Appeals, Diamond Housing Corporation v. Robinson, D. C. App. 257 A.2d 492 (1969) decided that where the lease was void from the inception under the principle of Brown v. Southall Realty Co., D. C. App. 237 A.2d 834 (1968) the tenant thereupon became by operation of law a tenant at sufferance and in order to terminate the tenancy a thirty days notice would be required.

Pursuant to this decision the respondent in this case thereupon gave the petitioner a thirty days notice and upon its expiration filed its complaint for possession based on this thirty days notice. The petitioner herein answered and demanded a trial by jury claiming that the respondent's action was retaliatory since she had prevailed in a prior action filed by the respondent and none of the housing violations had been corrected.

Thereafter respondent moved for summary judgment supported the motion by an affidavit of its' vice president to the effect that the petitioner was personally served with a thirty days notice to quit and that it was unwilling to make the repairs to the property and it was desirous of discontinuing the rental of the premises and claimed that the case of Edwards v. Habib, 130 U. S. App. D. C. 126, 397 F.2d 687 (1968) barred the respondent's recovery.

The motion for summary judgment was granted from which judgment the present application for an allowance of an appeal is being made.

Since the decision from which the application is now being made, there is in the record that this is a single family dwelling and that the petitioner was required to supply her own heat which was done by a gas fired hot water system, that during the winter of 1969 - 1970, because the petitioner failed to supply heat, the entire plumbing system of the premises froze and the petitioner had no sanitary facilities. Because of this condition the Redevelopement Land Agency found new housing accomodations for the petitioner and moved her to these new premises where the petitioner presently resides.

Because of this situation the premises were unoccupied and the petitioner no longer was in possession, the respondent contended and still contends (any claims for rent against the petitioner is being waived) that the question here is moot under the principle of Gaddis v. Dixie Realty Co., supra, and also Reese v. Diamond Housing Corporation in this court in case no. 23,768, order passed December 2nd, 1970.

SUMMARY OF ARGUMENT

1. Since the claim of retaliation can only be made when the facts show that the landlord seeks to recover possession, based on a thirty days notice, on where the tenant has complained to the government in absence of any such complaint there is no retaliation feature and that defense is not available.

2. Under all of the cases presently cited by the court if housing violations exist and the landlord is unwilling or unable to abate them he has a right to terminate the tenancy

3. As indicated by Judge Wright in Javins v. First National Realty Corporation, decided by this court on May 7th, 1970, in no. 22,405, damages caused by the tenant is a defense in favor of the landlord to a tenant's claim.

4. In view of the fact that by reason of the petitioner's negligence in failing to supply heat for the premises which resulted in total damages to the plumbing and that in turn caused her to be moved by R.L.A. and the premises were vacated by the petitioner, this matter is moot especially since the respondent has stated that it does not seek any arrears rent and has waived that claim.

A R G U M E N T

1. The basis upon which the claim for retaliation is made is missing from this case. The uncontradicted facts throughout shows clearly that the petitioner never complained to the city's housing inspection's office nor to any other governmental authority. The very essence of Edwards v. Habib, supra, is the claim that the landord sought to evict the tenant because she reported violations of law to the housing authority which would abridge her First Amendment rights to report violations of law and to petition the government for redress of grievances. The making of such complaints is at the core of the protection of the First Amendment speech as stated in that decision that before the tenant could prevail on this theory she must show that the goverment is, in some relevant sense, responsible for inhibiting her right to petition for redress of grievances. Since, in this case, no complaint was made to the government it cannot be said that the petitioner's constitutional right to complain to the

government has been abridged. Since the respondent was required to pay taxes on its property and had not received any rent from the petitioner for over two years, is it not logical to conclude that it wanted to terminate the tenancy for that reason? Edwards certainly does not hold that in every case, where a defense of housing violation is made and no complaint has been lodged with any governmental authority that the mere existence of housing violations in and of themselves constitutes a basis for a retaliatory defense.

2, Where it has been held that the premises violate the housing code, is the landlord limited to the only course, namely to make the repairs to bring the premises in conformance against his will? Or against his inability because of financial or other reasons? Is not the language of Chief Judge Bazelon appropriate in Whetzel v. Jess Fisher Management Co., 108 U. S. App. D. C. 385, 282 F.2d 943 (1960) 392, in which he states as follows:

> "Thus, it appears that par. 2301 imposes upon the appellee (landlord) a duty of care towards its tenants. This duty can be satisfied either by making the necessary repairs or by terminating use of the premises as a place of human habitation." (Underscoring supplied)

In the first Diamond Housing v. Robinson, Supra (1969) the D. C. Court of Appeals stated that, "The Housing Regulations do not compel an owner of housing property to rent his property. Where, as here, it has been determined that the property when rented was not habitable, that is, not safe and sanitary, and should not have been rented, if the landlord is unwilling or unable to put the property in habitable condition, he may and should promptly terminate the tenancy and withdraw the property from the rental market because the Regulations forbid both the rental and occupancy of said such premises." (Section 2301 Housing

Is an impsss to be reached where the premises do violate the Regulations and the landlord is unable financially to make the repairs, that the tenant may remain indefinitely without payment of rent, and with impunity violate Section 2301 of the Housing Code, which makes it unlawful for the tenant to occupy inviolation of the Regulations? Is a situation going to be permitted as now exists in Cooks v. Fowler, decided November 13th, 1970, No. 24,546, where it has been determined that the possessory claim of the landlord was not retaliatory and still the tenant refuses to pay anything in which case the owner is an eighty year old woman who has now been financially strapped and is unable to make the repairs and still the tenant insists upon not paying anything? Is it not understandable that if a landlord does not receive his rent, at least be should be entitled to have his property vacant and not be subjected to the criminal provisions of the Housing Code?

3. In this case, the tenant, upon her taking possession paid one months rent and since that time has paid no rent whatsoever and during all of which time deprived the owner of the possession, is not the language of Judge Wright in Javins v. First National Realty Corporation, _____ U. S. App. D. C. _____, 428 F.2d 1071 (1970) in footnote 62, Judge Wright used the following language, "(Moreover), the contract principle that no one may benefit from his own wrong will allow the landlord to defend by proving the damage was caused by the tenant's wrongful action." Unquestionably in this single family dwelling, where it

was the obligation of the tenant to furnish heat and the plumbing totally froze because of this failure comes directly within this principle. Therefore, the premises having been damaged by the petitioner in this case should not this principle fully apply? What is to be accomplished, now that the petitioner has been housed in other property, to continue the litigation in this case when the respondent has complied with all of the suggestions by this and the D. C. Court of Appeals to terminate the tenancy?

4. Does not the principle announced by this court in Gaddis v. Dixie Realty Co., 136 U. S. App. D. C. 403, 420 F.2d 245 (1969) and the order passed by this court on December 2nd, 1970, in Case 23,768, Reese v. Diamond Housing apply?

In this case, the respondent has, on several occassions and presently, stipulates that no claim for any rent will be made against the petitioner. The petitioner is out of possession. This was brought about by her own failure to heat the premises causing all of the plumbing to freeze. The petitioner could no longer remain. R.L.A. has relocated the petitioner. Is not the matter moot? The petitioner's vacating the premises was brought around by her own act. Why is not this case moot but the ~~Gaddis~~ Gaddis, supra, Reese, supra cases were moot and to be dimissed?

C O N C L U S I O N

We respectfully submit that no new principle will be accomplished or is required to retain this case and tie the respondent's premises in continued litigation, expensive litigation, when the respondent was adhering to this courts suggestion that where housing violations exist, if it was unwilling to make the repairs that the tenancy should be terminated. The principles and guides the lower courts have now been laid down and no further

illumination is required and we respectfully submit that the petition should be denied.

Respectfully submitted,

Herman Miller

CERTIFICATE OF SERVICE

Copy mailed to Mr. C. Christopher Brown, 416 - 5th Street, N. W., Attorney for Petitioner, by U. S. Mail, postage prepaid, this 2nd day of December, 1970.

Herman Miller